

1999

Salt Lake City v. Kent Leon Mecham : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY,

Plaintiff/Appellee,

vs.

KENT LEON MECHAM,

Defendant/Appellant.

APPELLEE'S BRIEF

Case No. 990740-CA

Priority No. 2

BRIEF OF THE APPELLEE

Appeal from a conviction and judgment of Battery, a class B misdemeanor, in the
Third District Court, Salt Lake Department, State of Utah, the Honorable Robin W.

Reese, Judge, presiding.

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FILED
Utah Court of Appeals

MAY 26 2000

Julia D'Alessandro
Clerk of the Court

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant Utah Code Ann. § 78-2a-3 (2)(e) (1996) wherein the Court is granted jurisdiction in appeals from a court of record in criminal cases.

ISSUE PRESENTED AND STANDARD OF REVIEW

Whether the trial court properly admitted a photograph into evidence, not previously disclosed in discovery, after attorney for Appellant opened the door to its admission by questioning the victim as to whether any such photograph existed. Issues of law are reviewed under a correctness standard, without deference to the trial court.

Meadowbrook, L.L.C. v. Flower, 959 P.2d 115 (Utah 1998).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The following statutes, rules and constitutional provisions relevant to the determination of this matter are set forth in Addendum A:

Utah Code Ann. § 78-2a-3 (2)(e) (1996)
Utah Rules of Criminal Procedure, Rule 16

STATEMENT OF CASE

On October 25, 1998, Defendant/Appellant Kent Leon Mecham (hereinafter “Appellant”), was charged with Battery in violation of Salt Lake City Ordinance §11-08-020. Record at 1 (hereinafter “R.”). A jury trial was held on June 9, 1999, before the Honorable Robin W. Reese in the Third District Court, Salt Lake Division. R. 31. The jury returned a verdict of guilty. R. 66. Appellant was sentenced on August 2, 1999, to

180 days jail with 120 days suspended, and placed on one year probation with Adult Probation and parole. R. 78. Appellant filed a notice of appeal on August 24, 1999. R. 81.

STATEMENT OF THE FACTS

On October 25, 1998, the Defendant/Appellant, Kent Leon Mecham (hereinafter “Appellant”), was charged with Battery, a class B Misdemeanor, in violation of Section 11.08.020 of the Salt Lake City Code. R. 1. On June 9, 1999, a jury trial was conducted, the Honorable Robin W. Reese presiding. R. 31. Appellant was convicted. R. 66. Prior to the trial, Attorney for Appellant filed a Request for Discovery on February 4, 1999. R. 8. The prosecution responded to the request for discovery on February 8, 1999. R. 9. The prosecution’s reply denied Appellant’s general request for discovery and indicated that the prosecution was providing only the information contained in its file and that other evidence might exist. R. 9.

During the course of the trial, the victim, Jenny Serenko, (hereinafter “victim”), testified that that the defendant had struck her in the face. R. 95:26-28. She further testified that she received some injuries as a result of the battery committed by the Appellant. R 95:29-30. Photographs of the victim taken by the Salt Lake City Police Department Crime Lab, and provided to Appellant as discovery, showing injuries to her face on the date of the incident, were also introduced into evidence. R 95:30. Officer Shawn Josphenson of the Salt Lake City Police Department testified that he observed injuries to her face on the date of the incident. R. 95:54-56. The victim testified that in

the weeks following the battery, the bruising to her face became substantially worse than what was observed and photographed on the day of the incident. R. 31. Counsel for the Appellant asked the victim “Do you have any photos of the other damage that you’ve claimed?” R. 95:45. The victim responded “ Oh yes, I do.” R. 95:45. On redirect, the prosecutor then sought the admission of a photograph in the victim’s possession, arguing counsel for defendant had opened the door to it’s admission. R. 95:45-49. The trial judge admitted the photograph into evidence. R. 95:49. The photograph was taken several weeks after the incident by a neighbor of the victim. R. 95:48. The prosecutor did not know of the existence of the photograph in the victim’s possession until the night before trial and had not seen the photograph prior to trial. R. 95:65. The photograph had not been provided to Appellant pursuant to his request for discovery. R. 95:65.

Appellant’s statement of the facts are not supported by the record, in that he states that the victim testified she had provided the prosecution with the photograph. Appellant’s brief, page 13. Nowhere does the record reflect that the prosecution was in possession of the photograph. The record reflects only that the prosecution was informed of the existence of the photograph on the night before the trial. R. 95:65. Counsel for Appellant asked the victim if she had “ever offered those to the Court.” R. 95:45. The victim responded, “Yes I have.” R. 95:45. Counsel for Appellant did not clarify what this question or response meant. R. 95:45. The photograph was in the possession of the victim, not in the possession of the prosecutor. R. 95:45. The prosecutor did not intend to admit the photograph into evidence and did not do so during the prosecution’s case in

chief. R. 95:45. The trial court found that the photograph was inculpatory, not exculpatory. R. 95:68. The trial court found that the prosecutor had not intentionally “[hid] the ball.” R. 95:87. The photograph was admitted only after the attorney for Appellant opened the door by questioning the victim regarding the existence of any photographs that would substantiate her claims of injury. R. 95:45-46, 84-90.

SUMMARY OF THE ARGUMENT

The trial court correctly admitted the photograph after the attorney for defendant questioned the victim regarding the existence of any photographs substantiating her claims of injury. The prosecution did not have a duty to disclose the evidence pursuant to Rule 16 of the *Utah Rules of Criminal Procedures*. While *State v. Knight* and subsequent case law have imposed additional discovery requirements on the prosecution, the prosecution fully complied with those requirements. First, the prosecution’s response to the request for discovery specifically denied the general request. Second, the response indicated that the materials being provided were only the materials in the prosecution’s file. Third, the response indicated that other evidence might exist. Finally, the response provided the name, phone number and address of the victim, providing Appellant the opportunity to question the victim prior to trial and discover, as the prosecution had, the existence of a photograph in her possession.

The Supreme Court of Utah has imposed upon Appellant a duty to exhaust remedies available under Rule 16(g) of the Utah Rules of Criminal Procedure for alleged

discovery violations. The Supreme Court and this Court have held that failure to do so waives any right to claim error. By failing to request a continuance in order consider the possible repercussions of and prepare for the surprise photograph, Appellant failed to exhaust remedies available under Rule 16(g). He therefore waived his right to claim error.

The weight of the evidence is such that there is not a substantial likelihood of a different outcome absent the admission of the photograph in question. In addition to the photograph at issue here, the prosecution presented additional evidence of the same injuries through the testimony of the victim, the testimony of a Salt Lake City police officer and the admission of photographs taken on the date of violation by a crime lab photographer. This cumulative evidence as to the victim's injuries makes it unlikely that, absent the admission of the single photograph, the verdict would have been different.

ARGUMENT

I. THE TRIAL COURT CORRECTLY ADMITTED THE PHOTOGRAPH.

A. The Prosecution was not required to provide a copy of the photograph pursuant to Rule 16 of the *Utah Rules of Criminal Procedure*.

The Utah Rules of Criminal Procedure do not require the production of inculpatory evidence not in the possession of the prosecution. Rule 16 of the *Utah Rules of Criminal Procedure* requires:

- (a) Except as otherwise provided, the prosecutor shall disclose to the

defense upon request the following material or information of which he has knowledge:

- 1) Relevant written or recorded statements of the defendant or co-defendants;
- 2) The criminal record of the defendant;
- 3) Physical evidence seized from the defendant or codefendant;
- 4) Evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant; or mitigate the degree of the offense for reduced punishment; and
- 5) Any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

Utah Rules of Criminal Procedure, Rule 16

The photograph at issue was in the possession of the victim. It was not in the possession of the prosecutor. The prosecutor did not know of its existence until the night before trial and had not seen the photograph prior to trial. It is not a written or recorded statement of the defendant. It is not part of the criminal record of defendant. It did not tend to negate the guilt or mitigate the guilt of the defendant or mitigate the degree of offense. The court did not order it provided. Pursuant to Rule 16 of the *Utah Rules of Criminal Procedure* the prosecutor had no obligation to provide copies of the photograph to defendant pursuant to his discovery request.

In *State v. Knight*, 734 P.2d 913 (Utah 1987), upon which defendant relies, the Utah Supreme Court does expand the duties of the prosecutor in providing discovery upon request of the Defendant. In *Knight*, the Court held that once the prosecutor

voluntarily provides discovery pursuant to Rule 16 (a)(5) of the Utah Rules of Criminal Procedure, without requiring defendant to obtain a court order, then the prosecutor has a duty to “respond to a request in a manner that will not be misleading.” *Id.* at 916. The Court states that the prosecution has a duty to identify items in the discovery request that have not been provided. *Id.* at 916. In *Knight*, the Utah Supreme Court further states that “For the misleading-the-defense rationale to apply, the discovery request must be sufficiently specific to permit the prosecution to understand what is sought and to justify that parallel assumption on the part of the defense that material not produced does not exist.” *Id.* at 917.

In the present case the prosecutor complied with the discovery requirements imposed pursuant to *Knight*. First, the prosecutor did not voluntarily provide discovery pursuant to Rule 16 (a)(5,) but sent a specific response indicating that Appellant’s general request for discovery was denied. The response further indicated that the materials being provided were only the materials that were in the prosecutor’s file. Moreover, the reply instructed Appellant that other evidence might exist outside the prosecutor’s file. “Plaintiff’s Reply to Defendant’s Request for Discovery and Certificate of Service” is included in the Record at page 9. Thus, the prosecution complied with the requirements of *Knight*, and responded to Appellant’s general request for discovery in a manner that was not misleading. The response specifically indicated that the only material being provided pursuant to the discovery request was material in the file of the prosecutor and that other evidence might exist. Therefore, because Appellant could not have been misled

by the prosecution's discovery response into believing no other evidence existed, pursuant to *Knight*, the misleading-the-defense rationale cannot apply.

Moreover, in *Knight*, a discovery violation occurred when the prosecution did not know the location of key witnesses and indicated such in their reply to the defendant's request for discovery. After subsequently locating the witnesses, the prosecution in *Knight* then failed to provide the defendant with their current addresses, depriving the defense of an opportunity to prepare for their testimony. In the present case, the name, address and phone number of the victim were included in the materials that were provided. The attorney for Appellant had the same opportunity to question the victim prior to trial as the prosecution, and to discover the existence of the photograph in the same manner the prosecution did.

The prosecution's response to appellant's request for discovery was specific in denying appellant's general request for discovery and informing appellant that the information provided was only the information in the possession of the prosecutor and that other evidence might exist. Therefore, the prosecution fully complied with discovery requirements.

B. Appellant's due process rights were not violated by the admission of the photograph.

Admission of inculpatory evidence is not a violation of the Due Process Clause of the United States Constitution. In *State v. Rugebregt*, 965 P.2d 518, 522 (Utah Ct. App. 1998), this Court addressed the obligation of the prosecutor in providing discovery to a

defendant. The Court held that the State had a duty provide “all exculpatory evidence.” This Court went on to hold that because the evidence at issue in *Rugebregt* was inculpatory, the “prosecutor’s discovery duty was limited to disclosures under Rule 16.” *Id.* at 522.

Appellant’s reliance on *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) is without merit. *Brady* held that “suppression by the prosecution of **evidence favorable to an accused . . .**” [emphasis added] violates due process. Therefore *Brady*, which deals with exculpatory evidence, is not on point. The trial court in the present case found that the photograph at issue was inculpatory.

Appellant’s further reliance on case law regarding prosecutorial misconduct is also without merit. The court found on the record that the prosecution in the present case had not intentionally withheld evidence. While Appellant has argued that the prosecution should not be rewarded for non-disclosure, no duty to disclose existed in the present case. Neither should the prosecution be held accountable for the conduct of counsel for Appellant in committing the cardinal sin of trial practice, to wit: never ask a question to which you do not know the answer .

Because the evidence at issue was inculpatory rather than exculpatory, the due process clause of the United States Constitution was not impacted and Appellant suffered no violation of rights as claimed.

II. BY FAILING TO REQUEST APPROPRIATE RELIEF UNDER RULE 16(g) OF THE UTAH RULES OF CRIMINAL PROCEDURE, APPELLANT WAIVED HIS RIGHT TO CLAIM ERROR.

Appellant waived his right to claim error by failing to exhaust relief available for alleged discovery violations under Rule 16(g) of the Utah Rules of Criminal Procedure. Rule 16(g) of the Utah Rules of Criminal procedure provides relief for discovery violations, including granting a continuance. The Utah Supreme Court has held that failing to exhaust remedies available under Rule 16(g) essentially waives a defendant's right to later claim error. *State v. Larsen*, 775 P.2d 415, 418 (Utah 1989). In *State v. Griffiths*, 752 P.2d 879, 883 (Utah 1988), the Utah Supreme Court held that by failing to move for a continuance "defendant waived relief under rule 16(g) . . . by not making timely efforts to mitigate or eliminate the prejudice . . ." This court has similarly held that dismissal of a case was inappropriate where the defendant failed to exhaust Rule 16(g) remedies, such as requesting a continuance. *State v. Christofferson*, 793 P.2d 944, 948 (Utah Ct. App. 1990).

This court addressed a similar issue in *State v. Rugebregt*, 965 P.2d 518 (Utah Ct. App. 1998), where evidence was introduced through a expert witness, the substance of which was contrary to the information provided pursuant to a request for discovery. In *Rugebregt*, this court held that because the defendant had failed to request a continuance or "devise any means of dealing with [the] . . . unexpected testimony," the defendant waived his right to challenge to the surprise evidence. *Id.* at 522. Similarly in this case,

Appellant failed to request a continuance to prepare for the unexpected photograph.

Therefore, Appellant waived his right to challenge the admission of the photograph.

III. THERE IS NOT A SUBSTANTIAL LIKELIHOOD THAT THE VERDICT WOULD HAVE BEEN DIFFERENT IF THE PHOTOGRAPH HAD NOT BEEN ADMITTED.

The cumulative evidence in this case was sufficient such that the admission of the single photograph is unlikely to have affected the outcome of the verdict. *See First Gen. Servs. v. Perkins*, 918 P.2d 480, 485 (Utah Ct. App. 1996). “[E]ven if we were to conclude that the evidence here was improperly admitted, that would not decide the issue. We still would have to determine whether the error was harmful.” *Id.*, quoting *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992). In the present case, the cumulative evidence against the Appellant was such that the jury would have certainly rendered the same decision even if the photographs had been excluded.

We will not overturn the trial court’s decision regarding admissibility of evidence unless it was an abuse of discretion. ... Moreover, even if the court erred in admitting the challenged evidence, “we will only reverse if this error was harmful, ‘i.e., if absent the error there is a reasonable likelihood of an outcome more favorable to the defendant.’”

State v. Blubaugh, 904 P.2d 688, 699 (Utah Ct. App. 1995) quoting *State v. White*, 880 P.2d 18, 21 (Utah Ct. App. 1994) (in turn quoting *State v. Dunn*, 850 P.2d 1201, 1221 (Utah 1993)).

The jury had the opportunity to assess the credibility of the victim, the investigating police officer, and Appellant. The victim testified as to her injuries. The photographs

taken by the Salt Lake City Police Department Crime Lab on the day the injuries occurred were consistent with the victim's testimony and were offered into evidence. The Officer's testimony about the injuries he observed was consistent with the victim's testimony and the crime lab photographs. The photograph taken two weeks later by the victim, showed the same injuries as those visible in the crime lab photographs and those testified to by both the victim and the officer. They were simply in a different stage of development.

The Utah Supreme Court addressed a similar issue in *State v. Thomas*, 974 P.2d 269 (Utah 1999). In *Thomas*, the prosecution did not reveal the existence of an inculpatory letter to the defendant. *Id.* at 271. The prosecution did not admit the letter into evidence during its case in chief. However, on cross-examination of the defendant, the prosecution used the letter to impeach his credibility. *Id.* at 271. The Utah Supreme Court held that the admission of the letter into evidence was harmless where “. . . the September letter was not a critical factor in proving the State's case; apparently the State was not even planning on using the letter before hearing Thomas's testimony.” *Id.* at 276. *Thomas* is directly on point with the facts of this case, where the photograph was likewise not a critical factor in proving the City's case and the prosecutor was not even planning on using the photo before hearing the defense cross-examine the victim regarding the existence of any photographs that substantiated her claimed injuries. And, unlike in *Thomas*, although the prosecutor in the present case found out the about the existence of


the photograph a few hours before trial, the prosecutor did not have the photograph in her possession. The photograph was always in the possession of the victim.

Considering the weight of other evidence, including the officer's testimony corroborating the victim's testimony, and the crime lab photographs, there is no "reasonable likelihood of an outcome more favorable to the defendant" in the present matter. *Blubaugh*, 904 P.2d at 699. The admission of the photograph was harmless.

CONCLUSION

Plaintiff/Appellee respectfully requests that this court affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 25th day of May, 2000.



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Attorney for Plaintiff/Appellee

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be mailed or delivered a true and correct copy of the foregoing Brief of the Appellant on this 25th day of May, 2000 to:

CLAYTON A. SIMMS

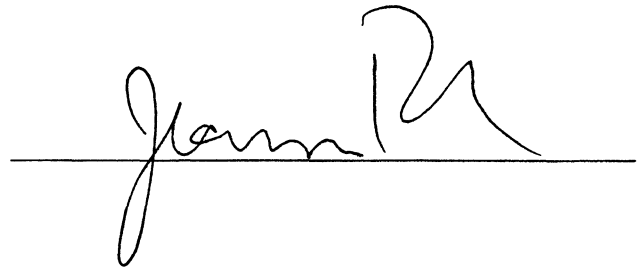
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ADDENDUM

§ 70-22 3. Court of Appeals jurisdiction

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs

Rule 16. Discovery.

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) Subject to constitutional limitations, the accused may be required to:

(1) appear in a lineup;

(2) speak for identification;

(3) submit to fingerprinting or the making of other bodily impressions;

(4) pose for photographs not involving reenactment of the crime;

(5) try on articles of clothing or other items of disguise;